

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs May 21, 2008

**IN RE C.A.H. & K.M.H.**

**Appeal from the Chancery Court for Wayne County  
No. 11982 Stella Hargrove, Judge**

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**No. M2008-00005-COA-R3-PT - Filed August 1, 2008**

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Father appeals the trial court's decision terminating his parental rights. Because the Department of Children's Services failed to show by clear and convincing evidence that it made reasonable efforts to make it possible for the children to return home, we reverse with respect to the two statutory grounds upon which the trial court based its decision: substantial noncompliance with the permanency plans and persistence of conditions. We further remand for the trial court to make findings of fact and conclusions of law with respect to the third ground for termination alleged in the petition: abandonment pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv).

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed and  
Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

William J. Eledge, Lawrenceburg, Tennessee, for the appellant, Anthony H.

Robert E. Cooper, Jr., Attorney General and Reporter; and Lauren S. Lamberth, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Anthony H. is the father of two daughters, C.A.H., born in 2002, and K.M.H., born in 2003. The two girls were taken into custody by the Department of Children's Services ("DCS") in September 2005. According to the DCS petition for temporary custody, the children were living in an unsafe environment with their parents, Anthony H. and Angela A., both of whom allegedly used illegal drugs. The juvenile court issued a protective custody order finding C.A.H. and K.M.H. to be dependent and neglected. When the girls were taken into custody, Anthony H. was arrested on indictments for the sale of methamphetamine and theft that occurred in April 2005. He pled guilty

to these charges in October 2005 and was sentenced to four years. After about a month in DCS custody, C.A.H. and K.M.H. were placed in the physical custody of Chad and Vanessa H., the brother and sister-in-law of Anthony H.

DCS drafted permanency plans for both girls on September 26, 2005. Because he was incarcerated, Anthony H. did not sign these plans. The plans established goals of reunification with parent(s) or exiting custody to live with relative(s); the goal target date was March 26, 2006. Under the permanency plans, Anthony H. was required to (1) resolve his legal issues, (2) remain drug free, (3) obtain safe, stable housing, (4) maintain a legal source of income, and (5) address domestic violence and anger issues. The permanency plans set forth actions needed to achieve the desired outcomes. With respect to remaining drug free, DCS was to make a referral for Anthony H. to complete an alcohol and drug ("A & D") assessment; he was to "participate in the assessment and follow all recommendations." Anthony H. was also required to submit to random drug screens. As part of resolving his legal issues, Anthony H. was not to obtain any new criminal charges.

Anthony H. was released from incarceration and put on probation in March 2006. In June 2006, he was arrested for criminal trespass, a parole violation, and reincarcerated for ninety (90) days.

The foster care review board met in July 2006. In its periodic review summary, the board recommended a change in the permanency goal to either adoption or exit custody to live with a relative. The projected date for goal achievement was January 2007. The board noted that neither parent had completed any tasks in the permanency plans nor had they made any progress toward reducing the risks that necessitated foster care.<sup>1</sup>

At a review hearing on August 16, 2006, DCS was ordered to hold a child and family team meeting to develop a revised permanency plan. Revised permanency plans for both children were prepared on November 15, 2006. Anthony H. was no longer incarcerated and signed the revised permanency plans. The plans provided for Anthony H. to have supervised visitation with the children. Despite the recommendation of the foster care review board meeting, the revised permanency plan listed the same goals: "Reunify with Parent(s)/Exit Custody to Live with Relative(s)." The new goal target date was February 15, 2007. The revised permanency plans were approved by the juvenile court on January 3, 2007.

In December 2006, Anthony H. participated in an A & D assessment on a referral from DCS. On February 8, 2007, Anthony H. was arrested on a two-count indictment for the sale of methamphetamine on September 24, 2006, and October 4, 2006. Anthony H. pled guilty to these charges on April 26, 2007, and was sentenced to eight years in prison.

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<sup>1</sup>The periodic review summary also stated that DCS had completed all tasks required of the agency under the permanency plans. Curiously, in response to the question, "Are Reasonable Efforts being made to reunite the family?", the summary indicated "No."

DCS filed a petition to terminate the parental rights of Anthony H. and Angela A. on February 28, 2007. DCS alleged three grounds for terminating Anthony H.'s parental rights: (1) substantial noncompliance with the permanency plans; (2) the persistence of conditions in the home such that returning the children to Anthony H.'s custody was not safe; and (3) abandonment by engaging in conduct prior to his incarceration that exhibited a wanton disregard for the children's welfare. Counsel was appointed for both parents. The court appointed a guardian ad litem for the children.

A hearing was held on August 30, 2007, and November 6, 2007. We will summarize the testimony relevant to this appeal.

Debra Fitton, child protective services investigator with DCS, described the conditions of the camper in which Anthony H., Angela A., and their two daughters were living at the time of the September 2005 investigation that led to the children's removal from the parents' custody:

[The camper] had one bedroom. There were no beds in the home. There was no electricity. There was running water. . . . There was debris, dirty clothes. The inside of the camper was unsanitary and unsafe for the children. There was rotten food in the refrigerator. I discussed the allegations with [Anthony H. and Angela A.] about the drug sales and drug use. Both admitted that they had a drug problem. Neither one of them admitted to selling. But there was warrants [sic] for [Anthony H.] that were indictments. So they arrested him while we were there.

Melissa Stults, a family social worker with DCS, described the requirements of the permanency plans. She noted that Anthony H. was incarcerated at the time the first permanency plans were drafted. Ms. Stults testified about the children's placement with Chad and Vanessa H., their paternal uncle and aunt. On the day of his release from jail in March 2006, Anthony H. came to Ms. Stults's office asking for visitation with his children, and she arranged for a visit that day. Anthony H. started having supervised visits with the children at the DCS office. He obtained employment and was soon permitted to see the girls at the foster home. Ms. Stults testified that "[i]t worked up to where he was getting like day visits and this progressed over a period of like two to three months where he was getting some overnight visitation with the girls." Then, Anthony H. suddenly stopped showing up for the visits, and DCS discontinued the unsupervised visits.<sup>2</sup>

Ms. Stults testified about the revised permanency plans. She stated that, at the time of the drafting of the revised permanency plans in November 2006, she did not feel comfortable returning the children to their parents because "[t]here had been very limited progress at that time on any of the goals that had been set on the permanency plan dated September of 2005." Anthony H. had not completed a drug assessment or anger management/domestic violence counseling. After his release from incarceration in September 2006 and prior to the revised permanency plan meeting in

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<sup>2</sup>Anthony H.'s failure to show up for visits coincided with his probation violation and reincarceration in June 2006.

November 2006, Anthony H. visited with the children at the DCS office on September 20, 2006; September 27, 2006; October 4, 2006; October 11, 2006; October 25, 2006. Ms. Stults testified that Anthony H. and Angela A. were “consistently late” to these visits.

Ms. Stults performed random drug screens. She testified that she asked Anthony H. and Angela A. to have a drug test on November 8, 2006. Angela A. tested positive for methamphetamine, marijuana, and amphetamines. Anthony H. told the tester that “there was no reason to do one on him, that he would test positive for the same things that [Angela A.] had.” Ms. Stults stated that, although the A & D assessment counselor had recommended inpatient treatment for Anthony H., he did not go to treatment. As will be discussed in more detail below, the summary of Anthony H.’s A & D assessment was introduced into evidence over the objection of his attorney.

When asked why the revised permanency plans did not reflect a change in permanency goals as recommended by the foster care review board, Ms. Stults testified that “[w]e were going to give [Anthony H. and Angela A.], you know, one more chance to try to working [sic] toward getting their children back.” Ms. Stults testified that Anthony H. was not present when she advised Angela A. that DCS could pay one month’s rent to allow her to attend inpatient rehabilitation. Ms. Stults did not know if Anthony H. had been given information about inpatient drug treatment programs in the area.

Ms. Stults stated that Anthony H. and Angela A. found housing in Waynesboro in November 2006. As stated in the permanency plans, Ms. Stults testified that Anthony H. was “very bonded with the girls.” He obtained employment and was described by Angela A. as an “excellent father.” Ms. Stults had observed the girls with their father: “[Anthony H.] did very well with the girls. They were always, you know, running to him, you know, with anything that went on during the visit. Just, you know, a bond with the girls.”

Ms. Stults was questioned by Anthony H.’s attorney concerning the financial ramifications for the foster parents if C.A.H. and K.M.H. were not adopted. If the children remained in the current placement without being adopted, the foster parents would no longer receive a subsidy from DCS. Ms. Stults acknowledged that there was a “subsidized guardianship” program, “but that has to be approved through central office.” Asked whether she had investigated the availability of such funds, Ms. Stults testified: “From my dealings with that program, they let us know who—the State lets us know who is eligible for that program. It’s not a decision that a case manager makes.”

Anthony H. was incarcerated at the time of the hearing and testified that he would be up for parole in January 2008. He admitted that he had not completed a drug rehabilitation program. Anthony H. testified that he felt that DCS had been fair with him and that Ms. Stults had provided him with adequate services. He acknowledged that, during the 26 months when his children had been in state custody, he had been out of jail for about eight months. Anthony H. stated that he had used drugs when he was out of jail; he testified that he had last used methamphetamine in November 2006.

Anthony H. testified that he had worked when he was out of jail but had not paid child support because he never got a court order informing him how much to pay. He had attended two domestic violence/anger management classes on a referral from DCS. It was Anthony H.'s understanding that the counselor was to meet him next at his mother's house but the counselor never came. Anthony H. testified that, after the missed meeting, he called and left a message on the counselor's answering machine.

Anthony H. testified that he had last seen his children in February 2007 right before he was arrested and incarcerated again. He stated that he had not seen the foster care review board report until his attorney showed it to him. According to Anthony H., DCS did not offer drug rehab services to him in 2006. He did not recall any of the caseworkers speaking to him about rehab. Anthony H. stated that, when he got out of prison, he planned to get a job and "do whatever I've got to do to get my kids back." He testified that he was "going to have to go into rehab as soon as I get out, I guess."

Vanessa H., Anthony H.'s sister-in-law and the foster mother for C.A.H. and K.M.H., testified that the children had been with her and her husband for a little over two years. She described changes in the girls since they started living with her:

Well, when we first got them I hadn't been around them much so it was all new for them. They cried a lot. They were pretty shy. Now they won't shut up. They are not shy at all. They do—And the oldest one has really opened up and she is doing really good in school. She's like top in her class. She's in kindergarten but she's very, very, very smart. And we've gotten closer. I mean we have a relationship now, to where when they first came we were just getting to know each other.

When asked about the possibility of the girls being removed from the foster home, Vanessa H. testified:

I don't think they would handle that very well. [C.A.H. and K.M.H.] are very—are pretty close. Even now when they meet, you know, the attorney, people come up that they don't know to talk to them, they shy up and they hug up to my leg. I don't think that that would go very well. I think it would really tear them apart. They have security now, something that they didn't have before.

Vanessa H. admitted that "it would be very, very difficult for us to get by taking care of them without [money for adoptive parents] . . . ." She stated that, while the children were in state custody and she and her husband were foster parents, they received monthly payments. Vanessa H. had been advised that, if she and her husband adopted the children, they could receive monthly payments. It was her understanding that, if they retained custody but did not adopt, monthly payments would no longer be available.

When asked to describe the relationship between the girls and their father, Vanessa H. testified:

Up about a month ago [Anthony H.] wrote me a letter and asked me would I let them send him cards or let him write a letter to the kids because he missed the kids and wanted them to know that he loved them. And I said that was okay, as long as he agreed on not telling them where he was at because that upsets them. . . . So since then he does write them letters. It's been about, I would say, about a month, and I read the letters to them and then they color pictures and write him back.

Vanessa H. described the girls' reaction to the letters from their father:

They want to write him back. I mean like if I read it to them--In one of the letters I remember him saying something to [C.A.H.] about her doing good in school and about the littlest one being stubborn and not wanting to put her shoes on in the mornings. And when I told her that she says, "I want to tell my daddy that I'm a big girl now and I put my shoes on." So I mean they want to write back and--you know, over whatever he asks or says to them. Wants him to know they are doing good in school.

Vanessa H. testified that, as long as Anthony H. remained sober, she would allow the girls to see him even if his parental rights had been terminated.

In a final order entered on November 26, 2007, the court terminated Anthony H.'s parental rights on the grounds of (1) substantial noncompliance with the permanency plans pursuant to Tenn. Code Ann. § 36-1-113(g)(2) and (2) persistence of conditions pursuant to Tenn. Code Ann. § 36-1-113(g)(3).<sup>3</sup> Anthony H. appeals.<sup>4</sup>

On appeal, Anthony H. raises the following issues: (1) whether the trial court erred in concluding that DCS made reasonable efforts in accordance with Tenn. Code Ann. § 37-1-166 toward reunification and to help Anthony H. comply with the permanency plans; (2) whether the trial court erred in terminating Anthony H.'s parental rights for substantial noncompliance pursuant to Tenn. Code Ann. § 36-1-113(g)(2); (3) whether the trial court erred in terminating Anthony H.'s parental rights for persistence of conditions pursuant to Tenn. Code Ann. § 36-1-113(g)(3)(A); (4) whether the trial court erred in finding that the termination of parental rights was in the best interests of the children pursuant to Tenn. Code Ann. § 36-1-113(i); and (5) whether the trial court erred in considering the report of the A & D assessment.

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<sup>3</sup>The court did not make any findings on the alleged ground of wanton conduct prior to incarceration.

<sup>4</sup>The mother did not appeal the termination of her parental rights.

## II. STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person's parental rights "has the legal effect of reducing the parent to the role of a complete stranger." *In re W.B., IV.*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, \*6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(l)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at \*7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code. Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the trial court's findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

### III. ANALYSIS

#### Reasonable efforts

\_\_\_\_Anthony H. argues that DCS failed to prove by clear and convincing evidence that it made reasonable efforts to provide him with the assistance he needed to regain custody of his children. DCS responds that the evidence supports the juvenile court's conclusion that the agency made reasonable efforts to provide services to Anthony H., especially in light of Anthony H.'s actions in continuing to engage in illegal conduct.

As emphasized in previous opinions of this court, the fundamental importance of the family is a principle woven into this state's public policy. *In re Tiffany B.*, 228 S.W.3d 148, 156-57 (Tenn. Ct. App. 2007) (perm. app. denied May 29, 2007). Our statutes establish "the policy that children should not be removed from their parents' custody unless the separation is necessary for the child's welfare or is in the interest of public safety, Tenn. Code Ann. § 37-1-101(a)(3) (2005), and that once children are removed, the first priority should be to reunite the family if at all possible." *Id.* at 157.

In cases involving a child's removal from his parent's custody, "[t]he success of a parent's remedial efforts generally depends on [DCS's] assistance and support." *In re Giorgianna H.*, 205 S.W.3d 508, 518 (Tenn. Ct. App. 2006). To further the policy favoring family reunification, "the Tennessee General Assembly has explicitly imposed on [DCS] the responsibility to make reasonable efforts to reunify children and their parents after removing the children from their parents' home." *In re Tiffany B.*, 228 S.W.3d at 158. Tenn. Code Ann. § 37-1-166(a) provides that, "prior to ordering a child . . . retained within the custody of the department of children's services, the [juvenile] court shall first determine whether reasonable efforts have been made to . . . [m]ake it possible for the child to return home." The burden is on DCS to prove that it has made reasonable efforts to make reunification possible. Tenn. Code. Ann. § 37-1-166(b). DCS must not only establish the statutory grounds for termination, "it must also establish by clear and convincing evidence that it made reasonable efforts to reunite the family and that these efforts were to no avail." *In re Giorgianna H.*, 205 S.W.3d at 518.

"Reasonable efforts" is defined to mean "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code. Ann. § 37-1-166 (g)(1). In determining and making reasonable efforts, "the child's health and safety shall be the paramount concern." Tenn. Code Ann. § 37-1-166(g)(1). DCS is required to prepare an individualized permanency plan for each dependent and neglected child in its custody. Tenn. Code. Ann. § 37-2-403. The requirements of the permanency plan "must be directed toward remedying the conditions that led to the child's removal from his or her parent's custody." *In re Tiffany B.*, 228 S.W.3d at 158 (citing *In re Valentine*, 79 S.W.3d at 547). In accordance with the permanency plans, DCS is obligated "to help parents become better able to provide their children with a safe and stable home and with consistent and appropriate care." *Id.*

The reasonableness of DCS's efforts depends on the circumstances of each case. The factors considered by courts in assessing the reasonableness of DCS's efforts include the following:



(1) the reasons for separating the parent from his or her children, (2) the parent's physical and mental abilities, (3) the resources available to the parent, (4) the parent's efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parent's remedial efforts, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department's efforts.

*In re Giorgianna H.*, 205 S.W.3d at 519. Parents, too, must “make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove their children from their custody.” *Id.*

In the present case, Anthony H. does not object to the reasonableness of the requirements set forth in the permanency plans. In order to work toward reunification, Anthony H. was to resolve his legal issues; remain drug free; obtain safe, stable housing; maintain a legal source of income; and address domestic violence and anger issues. Anthony H. asserts, however, that DCS did not make reasonable efforts to help him attain these goals. Specifically, he argues that DCS failed to meet its obligation “by changing the Department’s true Permanency Plan goal during a Foster Care Review board meeting on July 19, 2006 and failing to inform [Anthony H.] of the changed goal; by failing to properly apprise him that the Department intended to file a termination of parental rights suit against him in the Revised Permanency Plans ratified by the Wayne County Juvenile Court on January 3, 2007; by failing to provide him with sufficient time to make the desired improvements; by failing to seek a readily available less drastic alternative to a termination of parental rights suit; and by failing to offer programs suitable for a person with methamphetamine issues.”

We have concluded that DCS failed to prove by clear and convincing evidence that it made reasonable efforts in this case. The initial reasons that C.A.H. and K.M.H. were removed from the custody of their parents were the parents’ use of methamphetamine and environmental neglect. The permanency plan required Anthony H. to remain drug free. The DCS case manager was to “make a referral for [both parents] to complete an A & D assessment” and both parents were to “participate in the assessment and follow all recommendations.” The initial permanency plan was drafted in September 2005.<sup>5</sup> Yet the DCS affidavit of reasonable efforts states that Anthony H. had an A & D assessment on December 12, 2006. There are no statements in the affidavit or in Ms. Stults’s testimony to explain the delay of over a year in obtaining an assessment for Anthony H. Anthony H. was incarcerated from the time of the initial permanency plan until early March 2006, but he was out of jail and visiting his children at DCS and at his mother’s home until he was rearrested in June 2006. Anthony H. was out of jail again from September 9, 2006, through February 8, 2007, and

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<sup>5</sup>The September 26, 2005 permanency plans were drafted while Anthony H. was in jail. There is nothing in the record establishing that Anthony H. was provided with a copy of these permanency plans. However, based upon Anthony H.’s failure to raise any notice issues on appeal and his contact with DCS immediately upon his release from jail in March 2006, we assume that he received notice of the permanency plan requirements.

visiting his children under DCS supervision on a regular basis again. DCS did not put on any proof of its efforts to obtain an A & D assessment during these periods of time when Anthony H. was out of jail and in contact with DCS.

This court has previously addressed the pervasive and powerful effects of methamphetamine addiction. *In re M.J.M., Jr., L.P.M., & C.A.O.M.*, No. M2004-02377-COA-R3-PT, 2005 WL 873302, \*10 (Tenn. Ct. App. Apr. 14, 2005). As we noted in *In re M.J.M.*, the Tennessee Governor's Task Force on Methamphetamine Abuse recommends treatment programs for methamphetamine addicts that last for at least twelve months.<sup>6</sup> *Id.* Anthony H. received an initial A & D assessment on December 12, 2006 in which the evaluator recommended inpatient drug treatment. The revised permanency plan had a target date of February 15, 2007, and DCS filed its termination petition on February 28, 2007. Thus, Anthony H. had a little over two months to take action on the recommendations of the A & D assessment. It may be that DCS made previous referrals for a drug assessment and Anthony H. failed to participate, but there is no such evidence in the record. It is DCS's burden to prove that it made reasonable efforts.

In addition to DCS's apparent failure to order a timely A & D assessment, there are other troubling facts in the record. In July 2006, the foster care review board met and recommended a change in permanency goals to adoption, instead of reunification, or exit custody to live with relatives. Yet, according to Anthony H.'s uncontradicted testimony, he never received notification of the review board's recommendations. Moreover, when Anthony H. participated in the revised permanency plan in November 2006, the stated permanency goals remained the same: "Reunify with Parent(s)/Exit Custody to Live with Relative(s)." Thus, while Anthony H. had generally been informed that termination might occur at some point if he did not meet the permanency plan requirements,<sup>7</sup> he was not aware that termination proceedings were imminent at the time of the revised permanency plan meeting. After [Anthony H.] got his A & D assessment in December 2006, he did not promptly follow through on obtaining inpatient treatment. In her affidavit of reasonable efforts, Ms. Stults, the caseworker, stated that she had "provided [Anthony H.] with a list of several local drug rehab facilities." At the hearing, however, Anthony H. denied receiving any information about drug treatment from DCS in 2006. Ms. Stults admitted that Anthony H. was not present when she advised Angela A. that DCS could pay one month's rent to allow her to attend inpatient rehabilitation. In testimony inconsistent with the affidavit of reasonable efforts, Ms. Stults stated that she did not know if Anthony H. had been given information about inpatient drug treatment programs in the area.

Anthony H.'s efforts to deal with the problems that resulted in the removal of his children were insufficient to satisfy all of the requirements of the permanency plans. He was involved in

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<sup>6</sup>The final report of the Governor's Task Force on Methamphetamine Abuse is available at [http://www.kci.org/meth\\_info/methreport.pdf](http://www.kci.org/meth_info/methreport.pdf).

<sup>7</sup>The revised permanency plan included an attachment regarding the criteria and procedures for termination of parental rights; this form was signed by Anthony H. Anthony H. also admitted at the hearing that he knew termination was possible if he did not meet the permanency plan goals.

additional criminal activity that resulted in reincarceration and admitted to using drugs as late as November 2006. To his credit, however, Anthony H. obtained employment and housing and maintained fairly consistent visitation with his children when he was out of jail. He also initiated correspondence with the children during his incarceration.

As we have emphasized in previous opinions, “[w]hile the Department’s reunification efforts need not be ‘herculean,’ the Department must do more than simply provide the parents with a list of services and send them on their way.” *In re Giorgianna H.*, 205 S.W.3d at 519. In this case, the record does not even clearly establish that DCS gave Anthony H. a list of drug treatment providers, a basic action to assist him in overcoming his drug problem. To make reasonable efforts, DCS’s “employees must use their superior insight and training to assist the parents in addressing and completing the tasks identified in the permanency plan.” *Id.* Anthony H.’s recurring incarcerations may have hampered DCS’s ability to provide him with services, but we do not find clear and convincing evidence in the record that DCS used “reasonable care and diligence” to get Anthony H. the services he needed. Tenn. Code. Ann. § 37-1-166 (g)(1).

DCS cites the following testimony by Anthony H. in support of its argument that Anthony H. essentially conceded at the hearing that the Department had made reasonable efforts:

Q. Do you have any complaints with the way that Melissa Stults has worked with you?

A. No, sir.

Q. You think she’s worked with you well?

A. Yes, sir.

Q. Provided adequate services to you?

A. Yes, sir.

....

Q. Do you feel the Department has been fair?

A. Yes, sir.

We disagree with DCS’s reliance on Anthony H.’s opinion testimony because the reasonableness of DCS’s efforts is a legal issue. Based upon our de novo review of the evidence, we do not find clear and convincing evidence that DCS’s efforts were reasonable under the circumstances of this case.

Termination proceedings based upon the grounds in Tenn. Code Ann. § 36-1-113(g)(2)-(3) require DCS to demonstrate that it has made reasonable efforts to reunify the family. *In re A.R.*, No. M2007-00618-COA-R3-PT, 2007 WL 4357837, \*9 (Tenn. Ct. App. Dec. 13, 2007) (no Tenn. R. App. P. 9 application filed); *In re C.M.M. & S.D.M.*, No M2003-01122-COA-3-PT, 2004 WL 438326, \*7 n.27 (Tenn. Ct. App. Mar. 9, 2004). Because we find insufficient evidence to establish reasonable efforts by DCS, we reverse the trial court’s decision to terminate Anthony H.’s parental rights pursuant to Tenn. Code Ann. §§ 36-1-113(g)(2) and (3). In light of the absence of a showing of reasonable efforts by DCS, we need not proceed to address the other requirements of termination

based upon the grounds of substantial noncompliance with permanency plans or persistence of conditions.

Wanton conduct prior to incarceration

The petition for termination filed by DCS alleged a third ground for termination: abandonment by virtue of Anthony H.'s incarceration at the time of the filing of the petition and his commitment of acts prior to his incarceration "in wanton disregard of the welfare of the children." While the trial court noted this third ground for termination in its order, the court made no findings of fact or conclusions of law with respect to this ground. DCS argues that the trial court erred in failing to terminate Anthony H.'s parental rights pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv).

Tenn. Code Ann. § 36-1-113(g)(1) establishes a ground for termination based upon "[a]bandonment by the parent or guardian, as defined in § 36-1-102." Tenn. Code Ann. § 36-1-102(1)(A)(iv) sets out the definition of abandonment referenced in the petition in this case:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child . . . and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.

Pursuant to Tenn. Code Ann. § 37-1-166(g)(4)(A), DCS is absolved of the requirement of making reasonable efforts if "[t]he parent has subjected the child that is the subject of the petition . . . to aggravated circumstances as defined in § 36-1-102." Tenn. Code Ann. § 36-1-102(9) defines aggravated circumstances to include abandonment. Thus, with respect to the abandonment ground, DCS had no obligation to make reasonable efforts. *In the Matter of B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, \*11 n.5 (Tenn. Ct. App. Apr. 18, 2007).

While acknowledging the allegations of abandonment, the trial court failed to make a ruling on this ground. With respect to Tenn. Code Ann. § 36-1-102(1)(A)(iv), this court has previously stated:

We have repeatedly held that "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child."

*In the Matter of S.H.*, No. M2007-01718-COA-R3-PT, 2008 WL 1901118, \*7 (Tenn. Ct. App. Apr. 30, 2008) (quoting *In re J.R.B.*, No. M2007-00442-COA-R3-PT, 2007 WL 3244637, \*5 (Tenn. Ct. App. Nov. 2, 2007) (no Tenn. R. App. P. 11 application filed)). The record in this case contains significant evidence to support a finding of wanton disregard for the welfare of the children, including the evidence of Anthony H.'s probation violation, repeated incarceration, illegal behavior, and substance abuse. There is also evidence, however, that contradicts such wanton disregard, such

as Anthony H.’s consistent visitation and apparent bond with the children. We, therefore, remand for the trial court to make written findings of fact in accordance with Tenn. Code Ann. § 36-1-113(k) and to rule on this termination ground.

#### Admission of A & D summary

Anthony H. further argues that the trial court erred by considering confidential information or privileged communications between Anthony H. and the A & D counselor in violation of Tenn. Code Ann. § 63-22-114, which provides:

The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed. However, nothing contained within this section shall be construed to prevent disclosures of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

The assessment done by the A & D counselor was done on a referral from DCS.<sup>8</sup> Anthony H. asserts that the summary submitted by the counselor “was based on information given by [Anthony H.] in a confidential therapeutic setting, and contained details of [his] prior drug usage as well as [the counselor’s] predictions regarding [Anthony H.’s] chances for relapse.” We need not address this argument because we have determined, as argued by DCS, that any error in admission of the evidence was harmless. Anthony H. testified at the hearing that he had last used methamphetamine in November 2006 – the same information he provided to the A & D counselor. Moreover, there is nothing in the trial court’s order to suggest that the court relied in any way on the A & D assessment in making its ruling. Pursuant to Tenn. R. Evid. 103(a), “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .”

#### **IV. CONCLUSION**

Because of the errors identified above, the trial court’s judgment is reversed and the case remanded for further proceedings in accordance with this opinion. Costs of appeal are assessed against the appellee, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

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<sup>8</sup> At the hearing, DCS asserted that Anthony H. signed a release concerning the A & D evaluation. However, DCS never produced a copy of the release.